s. **Mitigation banking may be an acceptable form of mitigation**.

The term "mitigation bank" as used here refers to a habitat creation, restoration, or enhancement project undertaken by a project proponent to act as a bank of credits to compensate for habitat impacts from future development projects. Credits and debits shall be based on area or a scientifically valid measure of habitat function and value such as the Habitat Evaluation Procedure (HEP) or the Instream Flow Incremental Methodology (IFIM), or other method acceptable to EFSEC. The use of credits from a mitigation bank as a form of compensation shall occur only after the standard sequencing of mitigation negotiations (avoid, minimize, rectify, reduce, and then compensate).

EFSEC, in consultation with WDFW, shall determine the project impact, significance of impact, amount of mitigation required, and amount of mitigation achieved, based on the best available information, including the applicant's plans and specifications.

n. **Cumulative impacts of projects shall be considered**.

Cumulative impacts of projects shall be considered and appropriate measures taken to avoid or minimize those impacts.

o. **Project proponent responsible for all mitigation costs for the duration of impacts**.

Mitigation costs may include but are not limited to:

i. Studies to determine impacts and mitigation needs.

ii. Alteration of project design.

iii. Planning, design, and construction of mitigation features.

iv. Operation and maintenance of mitigation measures for duration of project impact (including personnel).

v. Compliance and effectiveness monitoring of mitigation measures.

vi. Contingency plans and adaptive management.

Mitigation costs are the responsibility of the project owner, proponent, certificate holder, or heir until the site is restored and fish and wildlife impacts cease.

p. **Performance bond or other monetary assurance may be required**.

A performance bond, letter of credit, escrow account, or other written financial guarantee may be required to ensure that the project proponent will fulfill mitigation requirements, operation and maintenance, monitoring, and contingency plans. The amount of the bond should cover the costs plus 10 percent.

q. **Mitigation site shall be protected for the duration of the impacts**.

The mitigation site shall be protected permanently, or at a minimum, for the duration of the impacts. This protection shall be through conservation easement, deed restriction, donation, or other legally binding method.

r. **Compliance and effectiveness monitoring shall be performed and reported to EFSEC.**

Compliance monitoring shall be performed to ensure that the required mitigation measures are developed in accordance with the site certification. Effectiveness monitoring of mitigation measures shall be performed to ensure that the mitigation measures achieve the desired results. EFSEC shall analyze the monitoring reports and may require changes in the mitigation activities or the employment of contingency plans.

Impacts shall be avoided to any species on the federal or state lists of endangered or threatened species. All practical measures shall be taken to avoid impacts to priority species and habitats as defined by the Department of Fish and Wildlife.

f. **For off-site fish mitigation, mitigation must occur in the same Water Resource Inventory Area (WRIA) as the impacts**.

For federal endangered or threatened species, mitigation must occur within the habitat supporting the same Evolutionary Significant Unit (ESU).

g. **Replacement Ratios.**

The ratios of replacement habitat to impacted habitat should be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values. Habitats that are difficult to establish or replace, such as shrub-steppe, oak woodland, etc., should be replaced at a minimum of a 3:1 ratio.

h. **Preserving at-risk, high quality priority habitat may be considered as part of an acceptable mitigation plan**.

When high quality areas of priority habitats or habitats of priority species are at risk, preservation of those habitats may be accepted as part of a mitigation plan, as long as there is no loss of habitat function. Unavoidable impacts to old growth forest are best replaced in this manner.

i. **Habitat mitigation measures shall be based on best available science**.

j. **Proven mitigation techniques must be used**.

Experimental mitigation techniques are allowable only if advance mitigation is being performed and will be fully functional prior to the project impacts.

k. **Mitigation shall proceed along with project construction**.

Mitigation measures are an integral part of a construction project and shall be completed before or during project construction, except projects with impacts that have no proven mitigation techniques. Those projects require advance mitigation.

l. **Delayed mitigation shall include replacement that is greater than losses**.

Mitigation that is implemented after project construction, or that requires a long time to reach replacement value, shall include additional habitat value (over and above replacement value) equal to the loss through time.

m. **EFSEC shall determine impacts and mitigation**.

i. Baseline data
ii. Estimate of impacts
iii. Mitigation measures
iv. Goals and objectives
v. Detailed implementation plan
vi. Adequate replacement ratio
vii. Performance standards to measure whether goals are being reached
viii. Maps and drawings of proposal
ix. As-built drawings
x. Operation and maintenance plan (including who will perform)
xi. Monitoring and evaluation plan (including schedules)
xii. Contingency plan, including corrective actions that will be taken if mitigation developments do not meet goals and objectives
xiii. Performance bonds or other guarantees that the proponent will fulfill their mitigation for the duration of the project impact, operation and maintenance, monitoring, and contingency plan obligations.

c. **Complete mitigation ensures no net loss of habitat functions or values, or populations**.

Complete mitigation is achieved when the mitigation elements ensure no net loss of habitat functions or values, or fish and wildlife populations. Habitat loss and mitigation success shall be measured with the Habitat Evaluation Procedure (HEP) or other method acceptable to EFSEC.

d. **On-site in-kind mitigation is the highest priority**.

EFSEC priorities for mitigation location and type, in the following sequential order of preference, are:

i. On-site, in-kind.
ii. Off-site, in-kind.
iii. On-site, out-of-kind.
iv. Off-site, out-of-kind.

For off-site mitigation to be accepted, the project proponent must demonstrate to EFSEC's satisfaction that greater habitat function and value can be achieved off-site than on-site.

Combination of the four types may be accepted. "On-site" means on or adjacent to the project impact site. "In-kind" means the same species or habitat that was impacted.

Out-of-kind mitigation is not acceptable for impacts to priority habitats and species, with one exception: priority habitats and species that are at greater risk can be substituted for impacted priority habitats and species. Priority habitats, and habitats of priority species, as defined by WDFW, may be replaced at a level greater than the impacts of the project on those habitats and species.

e. **Priority Species.**

WAC 463-42-332 shall be amended to read:

(1) Habitat for and number or diversity of species of plants, fish, ~~or other~~ and wildlife – The application shall describe all habitat types, vegetation, wetlands, ~~animal life,~~ wildlife, ~~and~~ aquatic life and instream flows which might reasonably be affected by construction, ~~or~~ operation, or termination of the energy facility and any associates facilities. Assessment of these factors shall include density and distribution information throughout all seasons of the year. The application shall contain a full description of each measure to be taken by the applicant to protect all habitat types, vegetation, wetlands, ~~animal life,~~ wildlife, ~~and~~ aquatic life and instream flows from the effects of project construction, operation, abandonment, termination, or cessation of operations.

WAC 463-XX-010 Fish and Wildlife.

(1) Introduction. This rule describes the standards for fish, wildlife, and habitat protection.

(2) Goal. The goal of EFSEC is to achieve no net loss of the functions and values of fish and wildlife habitat in the areas of the state impacted by energy development, including the productive capacity and opportunities reasonably expected of a site in the future. In the long-term, EFSEC shall seek a net gain in productive capacity of habitat through restoration, enhancement, and creation. Restoration and enhancement are preferred over creation of habitats due to the difficulty in successfully creating habitat.

Applicants shall follow the specifications below to achieve this goal.

(3) Additional Guidelines. The following factors provide information that applicants shall consider as guidelines in developing fish and wildlife mitigation plans that will be acceptable to EFSEC.

a. **Mitigation.**

"Mitigation" means actions taken to avoid, minimize, or compensate for impacts to fish, wildlife, or habitat from the proposed project activity; avoiding impacts is the highest mitigation priority. Mitigation shall continue for the duration of the project's impacts. EFSEC establishes the following sequential order of preferences for mitigation activities:

i. Avoiding the impact altogether by not taking a certain action or parts of an action.
ii. Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
iii. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
iv. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
v. Compensating for the impact by replacing or providing substitute resources or environments.

Compliance and effectiveness monitoring, and taking appropriate corrective measures to achieve the identified goal, is a necessary component of all of the above.

b. Mitigation Plan.

A mitigation plan for projects with significant impacts should include the following: